



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70531; File No. SR-MSRB-2013-04]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change Relating to a New MSRB Rule G-45, on Reporting of Information on Municipal Fund Securities

September 26, 2013.

I. Introduction

On June 10, 2013, the Municipal Securities Rulemaking Board (“MSRB”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change consisting of new MSRB Rule G-45 (reporting of information on municipal fund securities) and MSRB Form G-45; amendments to MSRB Rule G-8 (books and records); and MSRB Rule G-9 (preservation of records). The proposed rule change was published for comment in the Federal Register on June 28, 2013.³ The Commission received five comment letters on the proposal.⁴ On August 9, 2013, the MSRB granted an extension of time for the Commission to act on the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 69835 (June 24, 2013), 78 FR 39048 (“Notice”).

⁴ See letters to Elizabeth M. Murphy, Secretary, Commission, from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute, dated July 16, 2013 (“ICI Letter”); David L. Cohen, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association, dated July 18, 2013 (“SIFMA Letter”); Roger Michaud, Chairman, College Savings Foundation, dated July 19, 2013 (“CSF Letter”); Michael L. Fitzgerald, Chairman, College Savings Plans Network, dated July 19, 2013 (“CSPN Letter”); and Michael B. Koffler, Partner, Sutherland Asbill & Brennan, dated July 19, 2013 (“Sutherland Letter”).

filing until September 26, 2013. This order institutes proceedings under Section 19(b)(2)(B) of the Act⁵ to determine whether to disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The MSRB's Electronic Municipal Market Access ("EMMA") system currently serves as a centralized venue for the submission by underwriters of 529 plan primary offering disclosure documents ("plan disclosure documents") and continuing disclosures, such as annual financial reports submitted by issuers or their agents. However, the MSRB does not currently receive detailed underwriting or transaction information as it does for other types of municipal securities. Accordingly, the proposed rule change would, for the first time, provide the MSRB with more comprehensive information regarding 529 plans underwritten by brokers, dealers, or municipal securities dealers by gathering data directly from such persons.

The MSRB proposes to adopt new Rule G-45 to require each underwriter of a primary offering of municipal fund securities⁶ that are not interests in local government investment pools to report to the MSRB on new Form G-45 the information relating to such offering by no later than 60 days following the end of each semi-annual reporting period ending on June 30 and December 31.⁷ In addition, the MSRB would require that performance data be submitted

⁵ 15 U.S.C. 78s(b)(2)(B).

⁶ The term "municipal fund security" is defined in MSRB Rule D-12 to mean a municipal security issued by an issuer that, but for the application of Section 2(b) of the Investment Company Act of 1940, would constitute an investment company within the meaning of Section 3 of the Investment Company Act of 1940.

⁷ The proposed rule change would require an underwriter to report such information in the manner prescribed in the Form G-45 procedures and as set forth in the Form G-45 Manual. The MSRB provides that the Form G-45 Manual would be a new manual created to assist persons in the submission of the information required under proposed Rule G-45. This manual was not submitted as part of the proposed rule change.

annually. As described in further detail below, the required information would include plan descriptive information, assets, asset allocation information (at the investment option level), contributions, withdrawals, fee and cost structure, performance data, and other information.⁸

Under proposed Rule G-45, the obligation to submit the requested information to the MSRB would be placed on brokers, dealers, or municipal securities dealers that are underwriters under Rule 15c2-12(f)(8) of the Act.⁹ The MSRB notes that there may be more than one underwriter in a particular primary offering, stating that in the case of 529 plans, program managers, their affiliates, including primary distributors, and/or their contractors, may fall within the definition of underwriter. However, the MSRB would deem the obligation to submit the required information fulfilled if any one of the underwriters submits the required information. Accordingly, on Form G-45, each submitter could indicate the identity of each underwriter on whose behalf the information is submitted.

Form G-45 would require the submission of the following information:

Plan Descriptive Information: The underwriter would provide the MSRB with the (i) Name of the state, (ii) name of the plan, (iii) name of the underwriter and contact information, (iv) name of other underwriters on whose behalf the underwriter is submitting information, (v) name of the program manager and contact information, (vi) plan website address and (vii) type of marketing channel (whether sold with or without the advice of a broker-dealer).

Aggregate Plan Information: The underwriter would provide the MSRB with (i) total plan assets, as of the end of each semi-annual reporting period, (ii) total contributions for the

⁸ Interests in 529 plans are the only type of municipal fund security that would be covered by the proposed rule change.

⁹ 17 CFR 240.15c2-12(f)(8).

most recent semi-annual reporting period, and (iii) total distributions for the most recent semi-annual reporting period.

Investment Option Information: For each investment option offered by the plan, the underwriter would provide the MSRB with (i) the name and type of investment option (e.g., age-based, conservative), (ii) the inception date of the investment option, (iii) total assets in the investment option as of the end of the most recent semi-annual period, (iv) the asset classes in the investment option, (v) the actual asset class allocation of the investment option as of the end of the most recent semi-annual period, (vi) the name of each underlying investment in each investment option as of the end of the most recent semi-annual period, (vii) the investment option's performance for the most recent calendar year (as well as any benchmark and its performance for the most recent calendar year), (viii) total contributions to and distributions from the investment option for the most recent semi-annual reporting period and (ix) the fee and expense structure in effect as of the end of the most recent semi-annual reporting period. The MSRB proposes to permit the performance and fee and expense information to be submitted in a format consistent with the College Savings Plans Network's ("CSPN") published Disclosure Principles Statement No. 5 ("Disclosure Principles"), which commenters informed the MSRB is the industry norm for reporting such information.

Lastly, the MSRB proposes to amend its books and records rules under MSRB Rules G-8 and G-9 to require underwriters obligated to submit information to the MSRB under proposed Rule G-45 to maintain the information required to be reported on new Form G-45 for six years.

III. Summary of Comments Received

As noted above, the Commission received five comment letters on the proposed rule change.¹⁰ Four of the commenters expressed general support for the MSRB's desire to collect more comprehensive information relating to 529 plans.¹¹ However, all of the commenters¹² raised concerns or sought clarification about certain specific aspects of the proposal, including: (i) The scope of the definition of "underwriter,"¹³ (ii) the disclosure obligations of underwriters, including their ability to obtain, and verify the accuracy of, the requested information;¹⁴ (iii) the need for publication of the Form G-45 Manual;¹⁵ (iv) the MSRB's plans to publicly disseminate information filed on Form G-45;¹⁶ (v) the regulatory basis for the proposed rule change and value of the requested information on Form G-45;¹⁷ and (vi) requests for certain modifications to the content of Form G-45.¹⁸

A. Definition of "Underwriter"

Several commenters objected to the MSRB's description of the meaning of the term "underwriter" as used in Rule G-45 and stated that the MSRB should clarify the scope of the definition.¹⁹ These commenters cited the MSRB's statements in the Notice suggesting that 529

¹⁰ See supra notes 4.

¹¹ See ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter.

¹² See supra note 4.

¹³ See ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter. One commenter also questioned the MSRB's interpretation of "direct-sold" versus "advisor-sold" plans in relation to the scope of the rule and its application to underwriters. See Sutherland Letter.

¹⁴ See ICI Letter, CSPN Letter, CSF Letter.

¹⁵ See ICI Letter, SIFMA Letter.

¹⁶ See ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter.

¹⁷ See Sutherland Letter.

¹⁸ See ICI Letter, SIFMA Letter, Sutherland Letter.

¹⁹ See ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter.

plans may have multiple underwriters; that Rule 15c2-12(f)(8) under the Act, which the MSRB incorporates into Rule G-45, defines “underwriter” broadly; and that other entities (in addition to primary distributors) involved in operating or maintaining a plan, such as the plan’s program manager, their affiliates and/or contractors, could be deemed underwriters for purposes of the rule. One commenter asserted that 529 plans typically have only one underwriter²⁰ and argued, along with other concurring commenters,²¹ that many other entities involved in operating and maintaining a plan, such as the plan’s program manager, recordkeeper, investment manager, custodian, and state sponsor, in most cases, would not and should not be underwriters for purposes of Rule G-45.²²

Several commenters emphasized that, to fall within the definition of “underwriter” under Rule G-45, the person or entity must be a broker, dealer, or municipal securities dealer.²³ One commenter argued that a plan’s program manager, recordkeeper, investment manager, custodian, and state sponsor generally are not brokers or dealers and therefore would not qualify as underwriters under the MSRB’s definition.²⁴ Accordingly, this commenter requested that the MSRB clarify that the term “underwriter” would not include such entities if they provide services to the plan on behalf of the plan or its state sponsor and not as a broker, dealer, or municipal securities dealer.²⁵

²⁰ See ICI Letter.

²¹ See SIFMA Letter, CSPN Letter, and CSF Letter, which stated that they concur and/or endorse the ICI’s commenter.

²² See ICI Letter.

²³ See CSPN Letter, CSF Letter, ICI Letter.

²⁴ See ICI Letter.

²⁵ See ICI Letter.

Two commenters also specifically argued that a state sponsor should not be treated as an underwriter for purposes of Rule G-45, as they are not brokers, dealers, or municipal securities dealers.²⁶ These commenters stated that language in the Notice implied that state sponsors could be deemed underwriters and thus requested confirmation that proposed Rule G-45 would not apply to municipal securities issuers exempted under Section 3(d) of the Act.²⁷

Although not directly discussing the definition of “underwriter,” one commenter argued that the proposed rule and form should not apply to “direct-sold” plans because, by definition, such plans are sold without the involvement of a broker-dealer.²⁸ This commenter stated that the distinction between “direct-sold” and “advisor-sold” plans is not simply a “marketing distinction,” as MSRB had categorized it in the Notice, but is “critical in assessing the MSRB’s jurisdiction as it delineates between those 529 [p]lans that are sold through broker-dealers and those that are not.”²⁹ Accordingly, this commenter concluded that “direct-sold” plans are not subject to the MSRB’s jurisdiction.³⁰

Finally, one commenter expressed opposition to the imposition of the reporting requirements of new Rule G-45 on “broker dealers that are not underwriters but that instead have entered into contracts with the plan’s underwriter (primary distributor) to sell plan shares to retail investors.”³¹

B. Underwriter Reporting Obligation

²⁶ See CSPN Letter, CSF Letter.

²⁷ See CSPN Letter, CSF Letter.

²⁸ See Sutherland Letter.

²⁹ See Sutherland Letter.

³⁰ See Sutherland Letter.

³¹ See SIFMA Letter.

All five commenters believed the MSRB should clarify the disclosure obligations of underwriters.³² Four of these commenters stated that the MSRB is seeking information that many primary distributors will not be able to provide.³³ All of the commenters suggested that the MSRB clarify or confirm that underwriters would not be responsible for certain information that is outside of their possession, custody, or control.³⁴ For example, one commenter requested that the MSRB clarify that, when an underwriter, in its normal course of business, does not create, own, control, or possess information necessary for Form G-45, the underwriter is not required to obtain such information.³⁵ Another commenter requested that the MSRB clarify that an underwriter is required to provide the requisite information only to the extent such information relates to the distribution by the underwriter of municipal fund securities and is in the underwriter's possession or maintained by another entity on the underwriter's behalf for purposes of complying with MSRB rules.³⁶

Several commenters raised concerns that contractual provisions or privacy laws might not permit an underwriter to obtain the information required by the proposed rule and form.³⁷ In this regard, one commenter sought confirmation that, where the sharing of information between an underwriter and a recordkeeper would violate contractual provisions, the information would be deemed to be outside of the possession or control of the underwriter and not subject to the

³² See ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter, Sutherland Letter.

³³ See ICI Letter, CSPN Letter, CSF Letter, Sutherland Letter.

³⁴ See ICI Letter, SIFMA Letter, CSPN Letter, CSF Letter, Sutherland Letter.

³⁵ See ICI Letter.

³⁶ See CSPN Letter.

³⁷ See CSF Letter, CSPN Letter, SIFMA Letter, Sutherland Letter.

reporting obligations of Rule G-45.³⁸ Another commenter noted that, in the context of omnibus agreements, whether the required information is available to an underwriter is dependent on comprehensive servicing agreements between the plan, the underwriter, and the selling dealers.³⁹ Thus, this commenter noted that the agreements may not provide the underwriter with legal access to certain information and, as such, an underwriter should not be required to report such information on Form G-45.⁴⁰

Two commenters raised concerns about the MSRB's suggestion that an underwriter's disclosure obligation extends to "information in the possession of an underwriter's subcontractor."⁴¹ These commenters believed this suggestion "will produce confusion and disparate reporting results" depending on factors unrelated to Rule G-45 regulatory compliance.⁴² In particular, the commenters noted that, while some information may be in the possession of an underwriter's "subcontractor," other information may be in the possession of an unaffiliated or affiliated entity that is not a subcontractor, and privacy laws and contractual requirements may apply differently.⁴³

One commenter questioned the meaning of the MSRB's statement in the Notice that underwriters would be required to produce only information that they possess or "have a legal right to obtain."⁴⁴ The commenter stated that "unless the primary distributor has a specific,

³⁸ See Sutherland Letter.

³⁹ See SIFMA Letter.

⁴⁰ See SIFMA Letter.

⁴¹ See CSPN Letter, CSF Letter.

⁴² See CSPN Letter, CSF Letter.

⁴³ See CSPN Letter, CSF Letter.

⁴⁴ See Sutherland Letter.

enforceable legal right, such as one existing under law (such as a right created by a statutory provision) or arising from a specific contractual provision, to obtain specified information maintained by a third party, the primary distributor does not have a legal right to obtain the information for purposes of the proposal.”⁴⁵ As such, the commenter asserted that an underwriter may not be able to provide information in the possession of an underwriter’s subcontractor.⁴⁶

Two commenters also provided comments relating specifically to omnibus accounts, stating that Rule G-45 and Form G-45 should recognize that, to the extent an underwriter does not, in the normal course of business, have access to information on the accounts underlying an omnibus accounting arrangement, the underwriter should not be required to report such information.⁴⁷ These commenters also stated that, “in practice, the mere fact that there is an omnibus relationship between a selling dealer and a plan’s underwriter does not necessarily mean the underwriter has full transparency into all account information, including account owners, beneficiaries, contributions, and withdrawals, underlying the omnibus account.”⁴⁸

Lastly, two commenters contended that, if the underwriter is able to obtain the required information from a third party, the MSRB should clarify that the underwriter is not responsible for ensuring the accuracy or completeness of the information before including it on Form G-45.⁴⁹

C. Publication of the Form G-45 Manual

⁴⁵ See Sutherland Letter.

⁴⁶ See Sutherland Letter.

⁴⁷ See ICI Letter, SIFMA Letter.

⁴⁸ See ICI Letter, SIFMA Letter.

⁴⁹ See ICI Letter, Sutherland Letter.

Two commenters believed that the MSRB should be required to publish for comment the contents of the Form G-45 Manual (“Manual”) because the Manual will contain important substantive information concerning the reporting obligations under Form G-45.⁵⁰ One commenter stated that the “Manual’s contents will not be limited to technical specifications or design or system considerations relating to the mechanics of the electronic filing process.”⁵¹ This commenter asserted that, apart from the addition of boxes for notes regarding performance data and fee and expense data, neither Form G-45 nor Rule G-45 reflects the MSRB’s statements in the Notice that information may be submitted in a manner consistent with the Disclosure Principles.⁵² As such, the commenter concluded that the details regarding how to report data consistent with these Disclosure Principles would necessarily have to be set forth in the Manual.⁵³ Another commenter similarly stated that it believed that the Manual would incorporate the detailed substantive instructions of the Disclosure Principles.⁵⁴ Both commenters also suggested that the one-year implementation period should commence after the Manual has been published for comment and approved by the Commission.⁵⁵

D. Publication of the G-45 Data

⁵⁰ See ICI Letter, SIFMA Letter.

⁵¹ See ICI Letter.

⁵² See ICI Letter.

⁵³ See ICI Letter. Similarly, another commenter noted that, while the MSRB explained in the Notice that the information required on Form G-45 will be reported consistently with the reporting formats under the Disclosure Principles, proposed Rule G-45 and Form G-45 are silent on this point. See SIFMA Letter.

⁵⁴ See SIFMA Letter.

⁵⁵ See ICI Letter, SIFMA Letter.

Three commenters believed that confidential or proprietary information reported on Form G-45 should not be made available to the general public.⁵⁶ For example, one commenter stated that the data collected pursuant to Rule G-45 “should be used to inform the MSRB’s regulatory initiatives and priorities and not to compete with other more mature, robust, and comprehensive public sources of information on 529 plans.”⁵⁷ Another commenter stated that the MSRB should be required to file a proposed rule change subject to Commission approval if the MSRB desires to publicly disseminate certain 529 plan data reported on Form G-45.⁵⁸

E. Regulatory Value of Required Information and Regulatory Basis for the Proposal

While four commenters expressed general support for the MSRB’s effort to collect more comprehensive information on 529 plans for regulatory purposes,⁵⁹ one commenter believed that the MSRB failed to provide a “compelling rationale as to how the requested information would be useful to the MSRB, the SEC and FINRA given the nature of the requested information, the limited reach of the rule..., and the comprehensive regulatory system the MSRB has implemented for broker-dealers distributing 529 plans.”⁶⁰ In particular, the commenter asserted that the requested information has limited value as a regulatory tool because such information cannot impact the value of mutual funds or other investments in which plan investment options invest.⁶¹ In this regard, the commenter argued that, unlike the prices of municipal bonds, which are set by the market, the prices of 529 plans are based on the net asset value of the mutual funds

⁵⁶ See ICI Letter, CSPN Letter, CSF Letter.

⁵⁷ See ICI Letter.

⁵⁸ See SIFMA Letter.

⁵⁹ See ICI Letter, SIFMA Letter, CSF Letter and CSPN Letter.

⁶⁰ See Sutherland Letter.

⁶¹ See Sutherland Letter.

in which such investment options invest.⁶² This commenter also questioned the MSRB's assertion in the Notice that the information will "inform the MSRB of the risks and impact of each plan and investment option" and "allow the MSRB to assess the impact of each plan on the market."⁶³ In contrast, the commenter stated that the requested information merely provides information regarding fund flows and does not indicate the risks or impact of any plan or investment option on investors.⁶⁴

The commenter further asserted that the requested information would be substantially incomplete because the information obtained would not include data on "direct-sold" 529 plans, which the commenter stated represents more than half of the assets in the 529 plan industry.⁶⁵ The commenter also noted that certain data is already available in the public domain that includes both "broker-sold" and "direct-sold" plans, and therefore such existing data would be more comprehensive than the information collected by the MSRB under the proposal.⁶⁶

Finally, the commenter argued that the MSRB's jurisdiction does not extend to regulating the 529 plan market because the "MSRB's role is limited to regulating broker-dealers that distribute and sell municipal securities."⁶⁷

F. Contents of Form G-45

⁶² See Sutherland Letter.

⁶³ See Sutherland Letter.

⁶⁴ See Sutherland Letter.

⁶⁵ See Sutherland Letter.

⁶⁶ See Sutherland Letter.

⁶⁷ See Sutherland Letter.

Some commenters provided suggestions for modifications to the specific information requested by Form G-45 or sought clarification on how to report certain information on the form.⁶⁸ These comments are summarized below.

i. Investment Option Information

One commenter requested that the MSRB clarify in Form G-45 how to report an investment option that is used for multiple purposes.⁶⁹ This commenter also recommended that the MSRB clarify how underwriters should report fee, expense, and performance information for a mutual fund that issues multiple classes of shares with fees and expenses that vary from class to class.⁷⁰ Another commenter questioned how underwriters are supposed to report asset class and asset class percentages, and suggested that the two items related to asset class be eliminated.⁷¹ This commenter asserted that investment options do not have or invest in asset classes, thus the use of the phrase “asset classes in investment option” is unclear.⁷²

One commenter also recommended that the investment option information be reported in ranges rather than precise amounts, where appropriate (e.g., asset class allocation percentages), because the use of ranges would relieve underwriters of having to revise previously reported information whenever there is a de minimus change to such information.⁷³ This commenter further suggested that if the MSRB elects not to use ranges, it should consider revising the

⁶⁸ See ICI Letter, Sutherland Letter, SIFMA Letter.

⁶⁹ See ICI Letter.

⁷⁰ See ICI Letter.

⁷¹ See Sutherland Letter.

⁷² See Sutherland Letter.

⁷³ See ICI Letter.

updating requirements such that an update is not required to previously reported information unless there has been more than a de minimus change to such information.⁷⁴

ii. Performance Information

One commenter raised several issues with respect to performance information and advanced the following specific recommendations with regard thereto: (i) The MSRB should resolve a discrepancy between the definition of “performance” in Rule G-45(d)(viii) that means “total returns of the investment option expressed as a percentage net of all generally applicable fees and costs” and the requirement in Form G-45 that requires performance be reported both “including sale charges” and “excluding sales charges”; (ii) the MSRB should clarify whether a plan that is directly distributed and that has no “sales charges,” is expected to report the same information under “Investment Performance (Including Sales Charges)” and “Investment Performance (Excluding Sales Charges)” or just the later; (iii) the MSRB should clarify that fees that are not specific to any particular investment option are not required to be included in the performance calculation; (iv) the MSRB should resolve a discrepancy between a statement in the Notice that Form G-45 requires “performance for the most recent calendar year” and the Form G-45 requirement for disclosure of each investment option’s 1, 3, 5 and 10 year performance, as well as the option’s performance since inception; and (v) the MSRB should include a comment box under each of the two sections of Form G-45 relating to Investment Performance to avoid confusion as to whether the comments relate to performance excluding or including a sales

⁷⁴ See ICI Letter.

charge.⁷⁵ Furthermore, this commenter recommended that the MSRB clarify that a 529 plan is only required to report benchmark information if the 529 plan, in fact, uses a benchmark.⁷⁶

iii. Underlying Investments

Three commenters objected to the requirement to provide data regarding underlying investments on Form G-45.⁷⁷ In particular, two commenters recommended deleting the “Underlying Investments” section from Form G-45.⁷⁸ The other commenter suggested that the Commission should reject the proposed rule change as it relates to underlying investments, arguing that the MSRB does not have the legal authority or jurisdiction to mandate the filing of such information because such underlying investments are not municipal securities.⁷⁹ Two commenters also stated that this information is beyond what is required by the Disclosure Principles and is inconsistent with the MSRB’s previous response to comments stating that it had eliminated from its initial proposal the collection of information regarding the underlying portfolio investments.⁸⁰ Moreover, one commenter recommended that if the MSRB determines in the future that there would be regulatory value in having this information, the MSRB should revise Form G-45 at that time.”⁸¹

Another commenter believed that the MSRB’s request for information on “the name of each underlying investment in each investment option...” is inaccurate because 529 plan account

⁷⁵ See ICI Letter.

⁷⁶ See ICI Letter.

⁷⁷ See ICI Letter, SIFMA Letter, and Sutherland Letter.

⁷⁸ See ICI Letter, SIFMA Letter.

⁷⁹ See Sutherland Letter.

⁸⁰ See ICI Letter, SIFMA Letter.

⁸¹ See ICI Letter.

owner funds invest solely in the 529 plan and nothing else.⁸² This commenter noted that the plan trust is the sole legal and beneficial owner of the underlying investments.⁸³ This commenter therefore believed that it is inappropriate to request information about underlying investments because they are not part of what investors purchase and are not municipal securities.”⁸⁴

iv. Marketing Channel

One commenter questioned the value of requesting information on the “marketing channel,” which the MSRB described to be commonly known as either “advisor-sold” or “direct sold”.⁸⁵ As discussed above, this commenter argued that the requirements of the rule should not apply to “direct-sold” plans, since they do not involve a broker-dealer offering the securities.⁸⁶ As such, the commenter asserted that only broker-dealers would be providing the required information about “advisor-sold” plans, unless non-broker-dealers also made voluntary filings.⁸⁷ Such voluntary filings, the commenter urged, would only cause investor confusion.⁸⁸

v. Program Managers

One commenter suggested that all information requests related to program managers should be deleted from Form G-45 because the MSRB lacks jurisdiction “to seek information about an entity hired by 529 [p]lan trustees to provide services to the plan when neither the issuer

⁸² See Sutherland Letter.

⁸³ See Sutherland Letter.

⁸⁴ See Sutherland Letter.

⁸⁵ See Sutherland Letter.

⁸⁶ See Sutherland Letter; see also supra notes 28- 30 and accompanying text.

⁸⁷ See Sutherland Letter.

⁸⁸ See Sutherland Letter.

nor the entity are regulated by the MSRB.”⁸⁹ The commenter further questioned the relevance of such information to the MSRB’s role as a securities regulator of broker-dealers distributing municipal securities.⁹⁰

vi. Fees and Expenses

One commenter objected to the MSRB’s request for information on Form G-45 related to plan fees and expenses, including State fees, audit fees, asset-based fees, annual account maintenance fees, and bank administration fees.⁹¹ The commenter suggested that because the MSRB does not have jurisdiction over the regulation of 529 plans, it should not require primary distributors to submit data concerning securities product fees that are unrelated to the primary distributor.⁹²

G. Cost/Benefit of Data Collected

Three commenters addressed the costs of the proposed rule change versus the benefits of collecting the required information.⁹³ One commenter stated that, while the MSRB concluded in the Notice that the benefits of its proposal will outweigh the costs, the MSRB failed to quantify either the benefits or the costs.⁹⁴ Two commenters suggested that the Commission consider adding a waiver and/or sunset provision designed to mitigate the cost burden of an underwriter’s disclosure duty.⁹⁵ These two commenters stated that the addition of “a waiver application

⁸⁹ See Sutherland Letter.

⁹⁰ See Sutherland Letter.

⁹¹ See Sutherland Letter.

⁹² See Sutherland Letter.

⁹³ See CSPN Letter, CSF Letter, Sutherland Letter.

⁹⁴ See Sutherland Letter.

⁹⁵ See CSPN Letter, CSF Letter.

process will allow the affected underwriter to request relief from providing data that is not reasonably practicable to obtain.”⁹⁶ Similarly, these commenters believed a sunset provision could also “ease the administrative burden to underwriters required to submit information on Form G-45.”⁹⁷ In addition, these commenters suggested that the MSRB reexamine its need to collect each data point after a specified period of time and revise Rule G-45 accordingly in the event the MSRB determines that certain data points are no longer relevant.⁹⁸

IV. Proceedings to Determine Whether to Disapprove SR-MSRB-2013-04 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act⁹⁹ to determine whether the proposed rule change should be disapproved. Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to comment on the proposed rule change to inform the Commission’s analysis whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁰⁰ the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 15B(b)(2)(C) of the Act requires, among other things, that the rules of the MSRB shall be designed to prevent fraudulent

⁹⁵ See CSPN Letter, CSF Letter.

⁹⁶ See CSPN Letter, CSF Letter.

⁹⁷ See CSPN Letter, CSF Letter.

⁹⁸ See CSPN Letter, CSF Letter. The CSPN Letter and CSF Letter suggested three years.

⁹⁹ 15 U.S.C. 78s(b)(2)(B).

¹⁰⁰ Id.

and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.¹⁰¹

As discussed above, the MSRB's proposal would require underwriters of 529 plans to report certain information to the MSRB regarding the plans. The MSRB believes that its proposal would better position the MSRB to protect investors and the public interest because the information collected under the proposed rule would allow the MSRB to assess the impact of each 529 plan on the market, evaluate trends and differences among plans, and gain an understanding of the aggregate risk taken by investors by the allocation of assets in each investment option. In the MSRB's view, the information about activity in 529 plans is necessary to assist the MSRB in evaluating whether its current regulatory scheme for 529 plans is sufficient or whether additional rulemaking is necessary to protect investors and the public interest.

Four of the commenters expressed general support for the MSRB's desire to collect more comprehensive information relating to 529 plans. However, as discussed in detail above, all of the commenters raised concerns about various aspects of the proposal. Most notably, several commenters questioned the MSRB's description of the meaning of the term "underwriter" and suggested that the MSRB should clarify the scope of the definition as used in proposed Rule G-45. In their view, the MSRB's description of the definition of "underwriter" is overbroad and encompasses many other entities involved in the operation and maintenance of a 529 plan that

¹⁰¹ 15 U.S.C. 78o-4(b)(2)(C).

would not, in fact, meet the Commission definition of underwriter and thus should not be deemed to be underwriters for purposes of Rule G-45.

Commenters also questioned the scope of the underwriter's reporting obligations under the proposed rule. In particular, commenters asserted that underwriters would be, in many cases, unable to obtain the required information and requested clarification as to whether underwriters would be relieved from the obligation to provide information not in the underwriter's possession or control or if the underwriter is unable to obtain the information due to contractual provisions. Further, commenters sought confirmation that, to the extent that underwriters could obtain the information from third parties, they would not be held liable for the accuracy and completeness of the requested information.

The Commission believes that these comments raise questions as to whether the MSRB's proposal is consistent with the requirements Section 15B(b)(2)(C) of the Act, including whether it would remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, protect investors, municipal entities, obligated persons, and the public interest. In particular, the comments raise concerns that the proposed rule change is unclear as to whom the obligations of the rule apply and is being interpreted in a manner that is potentially inconsistent with statutory and Commission rule definitions of "underwriters" and "broker dealers." This uncertainty could result in noncompliance or needless compliance by entities and/or unnecessary duplicative reporting. Further, respondents may not be able to ascertain the scope of their obligations to provide the requested information under the proposed rule, including the extent to which they are responsible for providing, and verifying the accuracy of, information not in their possession.

In light of the confusion related to whom the proposed rule applies, questions are raised as to whether the disclosure obligations are sufficiently balanced to support the MSRB's statutory obligation to protect both investors and municipal entities without being overly burdensome.

As summarized above, commenters also pointed out various aspects of Form G-45 that they believe needs further clarification. Accordingly, the Commission believes that, without further clarification, the proposal may result in incomplete or incorrectly reported data. As such, the MSRB would not be able to fulfill its stated regulatory goals of obtaining accurate, reliable, and complete data in order to further assess and carry out its rulemaking responsibilities in this area.

For the foregoing reasons, the Commission believes the issues raised by the proposed rule change can benefit from additional consideration and evaluation in light of the requirements of Section 15B(c)(2)(C) of the Act.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any others they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Section 15B(b)(2)(C) or any other provision of the Act, or the rules and regulation thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.¹⁰²

¹⁰² Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be disapproved by [insert date 45 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2013-04 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MSRB-2013-04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2013-04 and should be submitted on or before [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Rebuttal comments should be submitted by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰³

Kevin M. O'Neill,
Deputy Secretary.

¹⁰³ 17 CFR 200.30-3(a)(57).

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